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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

E052044

v.

(Super.Ct.No. FSB802363)

TOM SMITH,

OPINION

Defendant and Appellant.

APPEAL from the Superior Court of San Bernardino County. Kyle S. Brodie, Judge. Affirmed.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Gil Gonzalez and Anthony Da Silva, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, defendant Tom Smith was convicted of first degree murder (Pen. Code, 1 § 187, subd. (a); count 1); assault by means likely to produce great bodily injury (§ 245, subd. (a)(1); count 2); dependent adult abuse (§ 368, subd. (b)(1); count 3); conspiracy to commit murder (§ 182, subd. (a)(1); count 4); custodial possession of a weapon (§ 4502, subd. (a); count 5); custodial manufacture of a weapon (§ 4502, subd. (b); count 6); and misdemeanor damaging prison property (§ 4600, subd. (a); count 7). The jury further found true the enhancement allegations that, as to count 2, defendant inflicted great bodily injury within the meaning of §§ 12022.7, subdivision (a), and 1192.7, subdivision (c)(1)(8), and as to count 3, defendant proximately caused the death of a victim over the age of 50 (§ 368, subd. (b)(3)(A)). In a bifurcated proceeding, the trial court found six prior conviction allegations to be true and granted the prosecution's motion to amend the information to conform to proof. Defendant was sentenced to state prison for a term of 168 years to life. He appeals, raising claims of ineffective assistance of counsel, sentencing error, and procedural error.

I. FACTS

In 2005 defendant was a patient at Patton State Hospital (Patton). Defendant roomed with Jason Porter, Michael Zamora and Robert Lucas in housing Unit 33.

Defendant was five feet five inches tall and weighed 260 pounds. Because he was overweight, he was on a reduced calorie diet and always wore black suspenders to keep his pants up. Defendant would unravel the fabric from the suspenders and wrap the string around a pen to make "jewelry." He was assigned to the caseload of Psychiatric

¹ All further statutory references are to the Penal Code unless otherwise indicated.

Technician Marie Rockwell. Rockwell saw defendant making his jewelry and counseled him to stop breaking apart the suspenders to do so.

On the evening of September 6, 2005, hotdogs were being served for dinner in the dining room at Patton. Defendant became upset after his request for a second hotdog was denied because of his diet. He became enraged and the staff calmed him down by telling him they would try to get his diet back to "regular" so he could have two portions. After 9:00 p.m., Rockwell saw Porter run into the main bathroom. Ten or 15 minutes later, Porter came out "hurrying" while putting on a prison-issued khaki button up.

At 10:15 p.m., Albert Rennie, a registered nurse, went to defendant's room to deliver a CPAP (continuous positive airway pressure) machine for sleep apnea to help defendant sleep. As he entered the room, Rennie saw defendant and Porter sitting on the bed whispering to each other while playing loud music.

At approximately 10:45 p.m., Senior Psychiatric Technician Mark Carty conducted rounds at housing Unit 33. As he was checking the bathrooms, he saw defendant and Porter in adjoining stalls, Porter said, "Oh shit. Oh shit." Carty stated he was doing the count and they identified themselves. Proceeding to Room 33-23, Carty saw Lucas lying on the floor, completely wrapped in bedding with only his ankles showing. The bedding was wet and smelled of urine. Lucas's feet were discolored. Carty touched Lucas's left shoulder but there was no response. Further shaking produced no response from Lucas, who was not breathing. Carty testified there appeared to be "some type of black material wrapped tightly around [Lucas's] neck," which looked like the black suspenders used by heavyset patients at Patton to keep pants up. He saw a

"moderate amount of blood spots" on the floor and the wall. Zamora was lying on an upper bed with his eyes closed. Carty notified the nurse's station and Rockwell ran to retrieve the crash cart.

The staff attempted to revive Lucas but was unable to do so. The suspender material wrapped around his neck was so tight the staff had to use a knife to cut it off. Zamora continued to lie in bed during the resuscitation efforts. Rockwell later heard defendant and Porter talking about how proud they were of killing Lucas. They were unremorseful about killing him, saying they were glad they did it. Defendant said "we just wanted to see how it felt to kill someone."

Charles Risch, a police sergeant at Patton, contacted defendant and Porter and read them their *Miranda*² rights. Defendant agreed to speak. The sergeant separated the two men. Defendant said, "I killed him. I strangled him with the suspenders." He then said that Porter had stabbed Lucas with a pen and punched him. According to defendant, he and Porter had been planning for a while to kill Lucas "because he [Lucas] was a child molester." Defendant said he got blood on his clothes. The sergeant saw blood on the floor of the room. When Sergreant Risch spoke to Porter and read him his rights, Porter admitted he was "in on it" with defendant and that he (Porter) stabbed Lucas with a pen.

Later, while outside smoking a cigarette, defendant told Officer Donald Sumner, an investigator at Patton, "I did it." Defendant said he used the suspenders and wrapped them around Lucas's head and face. He said the suspenders initially were in Lucas's mouth, but he was making a noise, so defendant wrapped them around Lucas's head and

² Miranda v. Arizona (1966) 384 U.S. 436.

face again. When defendant made this statement, he made a circular twisting motion with his hand to indicate how he had wrapped the suspenders around Lucas's head and face. Defendant said the second wrap of suspenders caused Lucas to begin to lose his breath.

During the early morning of September 7, 2005, homicide detectives David Dillon and William Flesher of the San Bernardino Police Department investigated the homicide of Lucas at Patton, collecting evidence. Detective Dillon spoke to Zamora, who said he had not been threatened. Detective Flesher conducted a tape-recorded interview with defendant, which was played for the jury. In the interview, defendant admitted killing Lucas because, among other reasons, Lucas was a bully. Defendant described Lucas lying on his side in bed. Defendant said, "Hale [sic] Satan." Defendant described tying the material around Lucas's mouth and neck. Zamora was sleeping but got up when he heard the commotion and asked what was going on. Porter told Zamora to go back to bed. Zamora was scared, so he complied. In response to Lucas struggling, defendant wrapped the material a second, and then a third time, around Lucas's neck, and they tied a knot. They put a blanket on Lucas and then urinated on him. Porter was laughing and said they were going to prison, where they would drink "real coffee" and be with his "Arian [sic] brothers." Defendant said he was not high on drugs when he killed Lucas.

Defendant stated in the interview that while Porter's excuse for killing Lucas was that Lucas was a child molester, defendant did not know if this was true. Defendant stated that he is a sex offender who "caught a[n] assault with intent to commit rape on a grown woman . . ." in 1992. Defendant felt a bond toward Porter, who gave defendant

money and liked the same kind of music. Defendant wanted to tell the district attorney that he was guilty, but not guilty by reason of insanity, because he heard Satan's voice when it was actually Porter that he was hearing. Although defendant thought he had to do what Porter told him to do when he killed Lucas, defendant admitted it was his fault that they killed Lucas. Based on the autopsy of Lucas, the medical examiner opined that Lucas's death was a homicide caused by ligature strangulation.

On May 1, 2009, during a cell check at West Valley Detention Facility (West Valley), Deputy Sheriff Guillermo Macias of the San Bernardino County Sheriff's Department saw a shank on top of a desk in defendant's cell. The shank was made from an inmate-issued comb that was sharpened to a point, and strings of a bedding sheet were used to form a handle. The deputy also saw that the sheet had been ripped and pieces were removed. When Deputy Macias held up the shank, defendant said, "that's mine." After being read his *Miranda* rights, defendant admitted he had made the shank two days prior to the cell check. Defendant claimed that he was using the shank as protection against other inmates; however, he would not reveal the names of the inmates from whom he needed protection. The deputy was unaware of any trouble with defendant at the jail.

Defendant testified in his own defense. He denied killing Lucas, claiming it was Zamora and Porter who did it. He said he was going to leave, but Porter threatened to get him too if he did. Defendant stated he helped them wipe up the blood with his clothes, and Zamora said he was returning to bed because he was medicated and "d[id]n't know shit." Defendant went to the bathroom to change clothing and was "panicking" because

he did not have a change of clothes. Defendant claimed he and Porter planned what they were going to say to the police. During cross-examination, defendant said that at least half of what he said to Detective Flesher was a lie.

In rebuttal, Ronnie Paez testified that he was in custody with defendant at West Valley. Defendant told Paez that he strangled the victim from behind, and it turned him on sexually. Defendant also said that Porter had stabbed the victim while defendant was strangling him. Defendant told Paez that he (defendant) was going to lie and tell the court or jury the only reason he had admitted killing the victim the day of the incident was because they were treating him badly at the hospital. Defendant also told Paez that he (defendant) had a prior conviction; that if he could win at trial, he would go back to attack and rape other women as he had done in the past.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

According to defendant, his trial counsel was ineffective during closing argument because he conceded defendant's guilt to second degree murder while failing to provide the jury with a legal theory justifying a finding of second degree murder, and he failed to mention any of the other charges against defendant, which could have been construed as a concession of guilt. Defendant further contends his counsel was ineffective when the prosecutor stated during closing argument that Porter pled guilty to the murder and defense counsel failed to object on the grounds that it was not supported by the evidence.

A. Standard of Review

"To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that

defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings. [Citations.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003.)

"In measuring counsel's performance, the United States Supreme Court has cautioned that judicial scrutiny 'must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [Citation.] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." [Citation.] There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.' [Citations.]" (In re Andrews (2002) 28 Cal.4th 1234, 1253-1254.)

B. Defense Closing Argument

During closing argument the prosecutor stated that the evidence was like a "documentary" about how Lucas was strangled to death by defendant and Porter, how defendant detailed the murder to the detective, and how defendant used skills to make the tools necessary to kill Lucas. Interrupting the prosecution's closing argument, defendant told the court that he wanted to leave the courtroom. He stated: "It's just been so long, your Honor. I'm tired of hearing it. I didn't do it." Defense counsel wanted defendant to be present. The trial court denied defendant's request and asked him to "hold it together." The prosecutor resumed, arguing there was no second degree murder; rather, all the charges, including first degree murder, had been proven.

Defense counsel's argument began as follows: "Well, my job just got harder because after the documentary, I found out what my documentary is going to be. But I'll carry on. [¶] For all of you parents out there let me offer you some advice for a certain few who might meet this criteria in terms of for a job description. Undeterred by impossible odds. Ready to change your story at the drop of a hat. The ability to look 12 citizens in the eye and look sincere. Doesn't mind losing once in a while. That would be a defense lawyer. And welcome to the defense bar." Defense counsel then reminded the jury about the presumption of innocence and the prosecutor's burden of proof. He argued his belief that this was a second degree murder, not a first degree murder case.

Defendant interjected, "Did I understand him correct? Did he just say—" The trial court asked defendant to be quiet. Defendant stated, "He said second-degree murder. I said I didn't do it. [¶] . . . [¶] I object to that."

Defense counsel continued arguing second degree murder because there was no premeditation and deliberation as evidenced by Porter's statement to defendant that now they would get hot coffee and get to fight and reap their reward for being sent to state prison.³ Defense counsel argued that the prosecution could not prove first degree murder because that discussion between defendant and Porter demonstrated a lack of premeditation and deliberation and there was no one else present when Lucas was killed. The following exchange occurred:

"THE DEFENDANT: And that's my lawyer saying that.

"THE COURT: Mr. Smith—

"THE DEFENDANT: I want to go back to my holding cell, man. I'm tired of this bull shit. I don't want to be here, homie.

"THE COURT: Mr. Smith—

"THE DEFENDANT: I don't care. I don't want to listen to that bull shit. I did not commit murder. I didn't kill that son of a bitch.

"THE COURT: Take Mr. Smith out of the courtroom.

"THE DEFENDANT: Thank you. You lying sack of shit."

Defense counsel then concluded his argument, as follows:

"You take your clients as you find them, okay. Despite his actions, despite his outbursts, despite his numerous problems, remember this is still a guy that it seems like

³ The jury heard defendant's taped interview with the detective, where defendant said, "Porter was laughin' and said, 'Ha, we're goin' to prison now. . . . We gonna drink some real coffee' . . . I was confused, man, you know what I'm sayin'? I couldn't believe what was happenin,' but all's I remember now was lookin' at . . . Lucas'[s] face. . . . And it was nothin' funny, man. It wasn't . . . nothin' nice, you know."

the guy never caught—you can't consider sympathy in your deliberations—but I can't think of a time in this guy's life when he caught a break. And I would like you to disregard his outbursts and think about the facts, that it took two people to hold and do the poking. And find him guilty of second-degree murder instead of first. Thank you."

Defendant faults his trial counsel's closing argument for (1) abandoning his claim of innocence and conceding guilt on second degree murder and (2) not mentioning any of the other counts.

Regarding the concession of second degree murder, the record reveals substantial evidence that defendant committed first degree murder. As the People point out, the marks on Lucas's neck were consistent with someone wrapping the black suspender material around it and pulling tight. Defendant admitted killing Lucas by strangling him. He also admitted planning the murder with Porter because Lucas was a child molester. From this manner of killing (strangulation), the jury could reasonably infer that defendant had time to consider the nature of his deadly actions. (*People v. Bonillas* (1989) 48 Cal.3d 757, 792, ["Ligature strangulation is in its nature a deliberate act"]; *People v. Lucero* (1988) 44 Cal.3d 1006, 1020 ["While . . . strangulation may not always evidence a premeditated murder [citation], the jury could have viewed the strangulation as a deliberate manner of killing sufficient to indicate a 'preconceived design.'"].)

By conceding second degree murder, defense counsel did not abandon defendant. Rather, counsel made a tactical decision to argue that defendant was, at most, guilty of second degree murder. It is not ineffective assistance of counsel when counsel admits obvious weaknesses in the defense case. (*People v. Gurule* (2002) 28 Cal.4th 557, 612.)

"[W]here the evidence of guilt is quite strong, 'it is entirely understandable that trial counsel, given the weight of incriminating evidence, made no sweeping declarations of his client's innocence but instead adopted a more realistic approach, namely, that . . . defendant . . . may have committed [some of the charged crimes]" (*Ibid.*) In some cases, good trial tactics may demand that defense counsel be completely candid with the jury. (*Ibid.*) Given the state of the evidence before this court, defense counsel attempted to make the best of a bad situation by conceding second degree murder. "[S]ensible concessions are an acceptable and often necessary tactic. [Citations.]" (*People v. Gamache* (2010) 48 Cal.4th 347, 392-393.)

Nonetheless, defendant notes his testimony and theorizes that the other men in his room committed the murder while he was too frightened to resist. Defendant would have the jury believe that his prior statements to the detective when he confessed to the killing were the result of fear or a diminished or altered mental state from the prescription drugs he was taking. Other than his self-serving testimony, there was no evidence that his actions were the result of fear or prescription medications. In fact, defendant testified about the medications he was on that night. He said one of his prescriptions raised metabolism to burn energy, one was for his psychotic episodes and depression but did not have any effect on him the night Lucas was murdered, and one helped him sleep.

As for defendant's ignorance that his attorney was going to concede guilt, after closing arguments and outside the presence of the jury, there was a discussion between the Bench and bar wherein defense counsel informed the court: "[W]hen you had warned us or talked to us about [defendant's] hand gestures and what not, disturbing [the

prosecutor's] closing, I had told [defendant] that there was no way that a reasonable jury would buy a defense of, now I didn't do it after all that's been said. And then I was going to go with the best defense that I could, and there we go." Defendant's claim of ignorance is not supported by the record.

Nonetheless, defendant argues that his trial counsel "did little for [him] throughout the trial, but the most egregious errors" occurred in counsel's closing argument, where counsel "impliedly conceded [defendant's] guilt and portrayed him as a l[ia]r." According to defendant, if his counsel had researched the law, he could have "attempted to negate a finding of express malice murder based on [defendant's] organic mental illness or altered mental state from the many prescription drugs he was taking at the time of the murder." To the extent defendant contends we should analyze his claim of ineffective assistance of counsel under the standard set forth in *United States v. Cronic* (1984) 466 U.S. 648, 658-660 (*Cronic*), we reject such contention.

In *Cronic*, our Supreme Court recognized that constitutional error exists "without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." (*Cronic*, *supra*, 466 U.S. at p. 659, fn. 25; see also *In re Johnson* (1965) 62 Cal.2d 325, 329 [under the California Constitution, a defendant has the right to the assistance of counsel at all stages of the proceedings].) We do not agree that defendant's counsel was totally absent or failed to assist defendant in this case. There was simply no evidence that defendant's actions were the result of an altered mental state. The fact that defendant may not have agreed with how his counsel argued the facts does not automatically make defense counsel's

performance deficient under *Cronic*. "[I]f counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the *Strickland*^[4] standard, that is the end of the matter; no tenable claim of ineffective assistance would remain." (*Florida v. Nixon* (2004) 543 U.S. 175, 192.)

Regarding defense counsel's failure to mention any of the other charged offenses, the People point out that counsel did argue that the jury must presume defendant was innocent and it must hold the prosecution to its burden of proving those offenses beyond a reasonable doubt. "The mere circumstance that a different, or better, argument could have been made is not a sufficient basis for finding deficient performance by defense counsel. [Citations.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 748.) In arguing for second degree murder, defense counsel did argue that defendant did not conspire with Porter before. As for the other charges, defendant fails to suggest how, if at all, any argument could have changed the outcome. "[J]udicious selection of arguments for summation is a core exercise of defense counsel's discretion." (*Yarborough v. Gentry* (2003) 540 U.S. 1, 7-8.)

C. Prosecutor's Closing Argument

During closing argument, the prosecutor stated: "The facts being applied to the law, murder. What is murder? How will you be instructed on that by the Judge? A person, in this case [defendant], along with Jason Porter, who has already [pled] guilty to murder intentionally with malice, did something with malice." Defense counsel did not object. The prosecutor later added, "So the defendant . . . conspired with Jason Porter to

⁴ Strickland v. Washington (1984) 466 U.S. 668, 688, 694 (Strickland).

kill the victim Robert Lucas and they did, in fact, kill him by use of the suspenders and a shank, that pen. Strangled and stabbed him, and in doing so it was intentional and willful and premeditated and that is expressed malice, and that is first degree murder. Mr. Porter has already [pled] guilty to murder." Again, there was no objection by defense counsel.

After the close of argument, during a discussion outside the jury, the following exchange occurred:

"[THE PROSECUTOR]: . . . There had been a question whether it had been introduced by testimony previously and the People have commented about it and the defense has on one or two points. Mr. Porter did plead guilty to murder previously. And I think some sort of stipulation or statement of that should be available to the jury even if it's just one sentence of, Mr. Porter previously [pled] guilty in this case.

"THE COURT: That's a stipulation that you'd be willing to enter, correct, [Defense Counsel]?

"[DEFENSE COUNSEL]: Yes, I believe it's true.

"THE COURT: And I suppose the Court could also take judicial notice. I will at the start of the instruction inform the jury that there is one additional piece of evidence that Mr. Porter previously [pled] guilty."

Defendant contends his trial counsel should have objected to the prosecutor's comment on the ground that it was misconduct to argue facts not in evidence and that it violated defendant's rights of confrontation. Further, defendant faults his counsel for failing to move to exclude such evidence from the jury's consideration under Evidence Code section 352.

Regarding the claim of failure to object to prosecutorial misconduct, we agree it is misconduct to argue facts not in evidence (*People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1316); however, based on the record before this court, the fact that Porter's plea was not in evidence appears to be one of oversight, not a deceptive method to influence the jury. As the trial court recognized, it could take judicial notice of Porter's plea. Nonetheless, defense counsel agreed to stipulate to the fact. This decision fit with counsel's argument that defendant was, at best, guilty of second degree murder.

In contrast, counsel's failure to object on the ground that the evidence violated defendant's right to confrontation is more troubling. The People argue that defendant could have called Porter to testify; however, defendant points out that the prosecution's first mention of Porter's plea was after the close of evidence, during closing argument. Thus, if defendant had requested to call Porter to the stand, defense counsel would have had to move to reopen the evidence and continue the trial in order to secure Porter's presence. Moreover, what Porter would have testified about, and the extent to which he could have testified, is unclear. As such, defendant argues that his counsel should have objected to the admission of Porter's plea as being more prejudicial than probative under Evidence Code section 352.

Assuming, without deciding, that defense counsel did not have a valid tactical reason for his decision not to raise an objection under Evidence Code section 352, defendant must still demonstrate prejudice as a result of that decision. To prevail on a claim of ineffective assistance of counsel, the defendant must not only show an unprofessional error but also that there is a reasonable probability the outcome of the trial

would have been more favorable in the absence of the error. A reasonable probability is one which is sufficient to undermine confidence in the outcome of the trial. (*Strickland*, *supra*, 466 U.S. at pp. 693-694; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

Here, the evidence that defendant murdered Lucas by strangling him to death was overwhelming. The only question was the degree.

Based on the record before this court, defendant has not demonstrated that defense counsel's closing argument fell below an objective standard of reasonableness, or that there is a reasonable probability that, but for counsel's allegedly deficient performance, the result of the trial would have been different. (*Strickland*, *supra*, 466 U.S. at pp. 686-687.) Accordingly, we reject his claim of ineffective assistance of counsel.

III. SECTION 654

Regarding the shank that defendant made and possessed while incarcerated, he contends that section 654 precludes separate punishments for custodial possession of a weapon, custodial manufacture of a weapon, and misdemeanor damaging prison or jail property, because his sole intent was to possess a weapon as evidenced by the fact that it was not used to commit a crime. We disagree.

A. Standard of Review

"Section 654 prohibits multiple punishment for a single act or an indivisible course of conduct. [Citations.] Whether a defendant's conduct constitutes a single act under section 654 depends on the defendant's intent in violating penal statutes. If the defendant harbors separate though simultaneous objectives in committing the statutory violations, multiple punishment is permissible. [Citation.]" (*People v. Williams* (2009)

170 Cal.App.4th 587, 645 [Fourth Dist., Div. Two].) Additionally, "[m]ultiple criminal objectives may divide those acts occurring closely together in time. [Citations.]" (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1565 (*Garcia*).)

"The trial court has broad latitude in determining whether section 654, subdivision (a) applies in a given case. [Citations.] In conducting the substantial evidence analysis we view the facts . . . "in a light most favorable to the respondent and presume in support of the order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" [Citation.]" (*Garcia*, *supra*, 167 Cal.App.4th at p. 1564.) Here, there was substantial evidence upon which the trier of fact could conclude that defendant had multiple criminal objectives during the time period he committed the crimes.

B. Analysis

The facts before this court support the trial court's finding that section 654 did not preclude separate punishment for defendant's custodial possession of a weapon, custodial manufacture of a weapon, and misdemeanor damaging prison or jail property. Deputy Macias testified that during a search of defendant's cell at West Valley, he saw the shank on top of a desk. The shank was made from an inmate-issued comb that was sharpened to a point and strings from a bedding sheet were used to form a handle. Deputy Macias also saw that the sheet had been ripped and pieces removed. The comb and bed sheets were the property of the detention center. Defendant admitted the shank was his. He claimed that he made it two days prior to the search, and that he did so for protection. However, defendant failed to identify anyone from whom he needed protection. Given this evidence, the People argue that (1) the time period shows that defendant possessed

the finished shank two days after he manufactured it, and (2) defendant's acts of damaging prison or jail property (filing the comb to a sharpened knife and ripping sheets to make a handle) were not identical in time to each other or to the manufacturing and possession of a weapon. We agree. In addition to the temporal separation, each crime amounted to a separate act with separate and distinct criminal objectives.

IV. NEW TRIAL MOTION

In his final argument, defendant faults the trial court for not ruling on his new trial motion; he requests remand with directions to issue a ruling. The People contend that the trial court did rule on the motion by denying it.

Prior to trial on defendant's prior convictions, but after he was granted the right to represent himself, he filed a motion for new trial. On August 20, 2010, a court trial was held on defendant's prior prison terms and serious felonies allegations. That same day, the trial court set a hearing on the motion for new trial, along with sentencing, for September 27, 2010. The court added: "I'm going to consider [defendant's] motion for a new trial at that time. I have reviewed it. [¶] Mr. [Prosecutor], one matter that I would like you to be prepared to address at the time is the allegations raised by [defendant] that Mr. Paez was, in fact, given leniency for exchange for his testimony in this case. There's allegations made—I will not say that they are—they are not based on sufficient evidence to warrant a formal hearing into the matter, but if you could be prepared to address just that concern—that particular concern of [defendant] at the hearing. We will take it up—"

Defendant inquired whether that meant he would get a new trial. The court responded it was going to consider his motion on the sentencing date, and that the court had asked the prosecutor to specifically address defendant's allegations regarding Paez.

On September 27, 2010, the parties appeared for sentencing. At that time, the prosecutor indicated that the People had not made any offer or concession to Paez in exchange for his trial testimony. The court responded, "Thank you. That was my only concern." With no further comments on the motion for new trial, the court began discussing the possibility of consecutive terms under the Three Strikes Law and asked defendant if he wished to say anything. After waiting 30 seconds and receiving no response from defendant, the court construed defendant's smile as a lack of any objection. The court then proceeded to sentence defendant.

A. Standard of Review

If a defendant seeks a new trial, he must make such motion prior to sentencing.

(People v. Stuckey (2009) 175 Cal.App.4th 898, 912; § 1182 ["The application for a new trial must be made and determined before judgment"].) Section 1202, in relevant part, provides: "If the court shall refuse to hear a defendant's motion for a new trial or when made shall neglect to determine such motion before pronouncing judgment or the making of an order granting probation, then the defendant shall be entitled to a new trial." However, "[i]f the trial court's failure to hear or rule on the new trial motion appears to be inadvertent, the defendant must make some appropriate effort to obtain the hearing or ruling. [Citations.]" (People v. Braxton (2004) 34 Cal.4th 798, 813.)

B. Analysis

Here, the trial court clearly heard and considered defendant's motion for new trial as evidenced by its request that the prosecutor be prepared to address the allegations regarding the testimony of Paez. After the prosecutor provided the court with the information it sought, the court responded, "Thank you. That was my only concern." From all appearances, the only reason why the court would have granted defendant's request for new trial is if there had been a deal offered to Paez in exchange for his testimony. Because there was no deal, the record suggests that the trial court implicitly denied defendant's motion.

Nonetheless, defendant would have us remand the matter and direct the trial court to rule on defendant's motion for new trial. We decline to do so under the facts of this case. When the trial court failed to specifically state that it was denying the motion, defendant sat silently. He did not press for a ruling. Rather, he acquiesced in the court's silence. Under such circumstances, defendant has forfeited this issue for appellate review. (*People v. Braxton, supra*, 34 Cal.4th at p. 814.)

V. DISPOSITION

The judgment is affirmed.

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		HOLLENHORST
		Acting P. J.
We concur:		
KING		
	J.	
CODRINGTON		
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